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NO. 85-662

IN THE

Supreme Court of the United States

OCTOBER, 1985 TERM

STATE OF TEXAS,
Petitioner

v.

UNITED STATES DEPARTMENT
OF ENERGY, ET AL.,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE and AMICI CURIAE BRIEF

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To The Honorable Supreme Court of the United States:

The Texas Farm Bureau and the American Farm Bureau Federation, under the authority of Rule 36.1 of this Court, hereby move for leave to file the accompanying Amici Curiae Brief in Support of the Petition for Writ of Certiorari filed by the State of Texas and now

pending herein. As grounds for said motion, these agencies would show the Court the following:

I.

The Texas Farm Bureau, which is a member of the American Farm Bureau Federation, is a voluntary association with 317,575 member families and affiliate organizations in 217 Texas counties. The organization was aware of this litigation from the time of the institution of the suit and assumed that the Circuit Court would enter a fair and equitable decision on the merits. The Order of Dismissal was a disappointment, but much more serious and alarming was the ambiguity of the Opinion with regard to the appealability of actions or decisions of the Secretary of Energy.

II.

The American Farm Bureau Federation is a non-profit corporation chartered in the State of Illinois. In addition to Texas, the AFBF represents the interests of its member state Farm Bureau organizations in 47 other states and Puerto Rico. The AFBF represents 3,148,303 member families through the state Farm Bureaus. The interest of the AFBF in this case was prompted by the decision of the Circuit Court which dismissed the appeal by adopting contentions made by the Secretary of Energy that the decisions in question were not "final" or not "ripe" for judicial review without identifying any point in time at which a determination by the Secretary of Energy, as contrasted with an agency determination, becomes reviewable in the courts. The Opinion itself, therefore, converted what might have been viewed as a local or state issue into a question of nationwide importance.

III.

The Solicitor General has apparently attempted to convince this Court that the case is of little or no importance. The State of Texas has received a copy of the waiver of response unless this Court directs that an answer be filed to the State's petition.

IV.

A challenge to adopted guidelines pending as Cause No. 85-7128 in the Court of Appeals for the Ninth Circuit has been met with a Motion to Dismiss filed by the Department of Energy. The motion is made on the same contentions as those advanced against the State of Texas and, if granted, will probably prompt the Solicitor General again to seek to avoid this Court's review.

V.

These Movants are highly concerned with all procedures which indicate the motivation of the Department of Energy to avoid judicial review at any stage or at least to delay review until the process of waste disposal site selection has advanced to such a point and resulted in so great an expenditure of time and money that reversal would be contrary to the public interest as a whole.

VI.

The Movants here are in complete accord with the reasons for granting the writ urged in the petition filed by the State of Texas but seek to supplement those reasons and the arguments thereunder with others which emphasize the importance of the case to every state in the Union.

WHEREFORE, Movants pray for leave to file the accompanying Amici Curiae Brief.

Respectfully submitted,

MARY JOE CARROLL

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Of Counsel:

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AMICI CURIAE BRIEF IN SUPPORT OF PETITION

THE INTERESTS OF AMICI CURIAE

The Texas Farm Bureau and the American Farm Bureau Federation do not seek to protect any state or any area from or to advocate any site or sites for selection as a nuclear waste repository or repositories. Instead, the reasons for supporting the petition are that these

organizations are concerned with the rights of all people of this nation to strict enforcement of law and to statutory construction in conformity with time-tested and proven principles which preserve the rights guaranteed by the Constitution.

Congress provided for judicial review of decisions and actions of the Secretary of Energy in carrying out the duties assigned to him under the Nuclear Waste Policy Act of 1982, Pub. L. 97-425, 96 Stat. 2201, 42 U.S.C. §§ 10121, et seq. The Department of Energy apparently seeks to avoid or at least to delay judicial review until such time as the right would become meaningless. Only this Court can enforce the will of Congress and preserve the constitutional rights of the states and of their inhabitiants.

ARGUMENT

The reasons for granting the writ set forth in the petition of the State of Texas are adopted. Additional reasons for granting the writ include the following:

1. The case is an important one of first impression.

This Court has considered the measure here involved, the Nuclear Waste Policy Act of 1982, only in *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*, ____U.S.____, 103 S. Ct. 1713 (1983). The basic issue there was preemption. The question urged in the pending petition of the State of Texas was in no way involved, but this Court did in the reported case recognize that the measure is "a complex bill" (103 S. Ct. 1730).

The only other reported case under the Act is *General Electric Uranium Management Corporation v. United States Department of Energy,* 584 F.Supp. 234 (D.C. 1984). There, the Department of Energy protested district court jurisdiction over the waste fee authorized by Section 302 of the Act, contending that exclusive jurisdiction was vested in the Courts of Appeal. The district court, however, pointed out that Section 302 does not fall within the same "part" of the Act as Section 119 and, therefore, that the attack made was within the general jurisdiction of the District Court. The case is another example of the Department's efforts to avoid judicial review.

A case of first impression on statutory construction merits decision by this Court. *American Federation of Musicians v. Wittstein,* 379 U.S. 171 (1964); *Nixon v. Fitzgerald,* 457 U.S. 731 (1982).

2. The question is one of extreme importance.

The manner in which the Nuclear Waste Policy Act is to be administered will be determined by this Court's action on the pending petition. That fact alone could well prompt acceptance of jurisdiction. *United States v. Ruzicka,* 329 U.S. 287 (1946).

No state has been categorically excluded from consideration as a possible site of a nuclear waste repository. The ultimate operation of the Act is a matter of nationwide importance. The issues presented involve state-federal relations and are, therefore, clearly appropriate for this Court's exercise of jurisdiction. *Pate v. Robinson,* 383 U.S. 375 (1966); *Davis v. Scherer,* ____U.S.____, 104 S. Ct. 3012 (1984).

An early and definitive ruling by this Court on the general matter of appealability under the Act is highly desirable and could well avoid a multiplicity of appeals which otherwise would be encouraged by the opinion below. When concerned parties do not know at what stage in the selection process a decision of the Secretary of Energy becomes appealable, the normal tendency will be to appeal from any order or decision, either because the specific question has not been determined or because there is always a possibility that one circuit court will not follow a ruling made by another. *United States v. Powell,* 330 U.S. 238 (1947); *United States v. Standard Oil of California,* 332 U.S. 361 (1947); *Perry Educ. Association v. Perry Local Educators' Association,* 460 U.S. 37 (1983).

Questions of jurisdiction, either of this Court itself or of the lower federal courts, are matters of importance peculiarly within this Court's sphere of authority. *Liberty Mutual Insurance Company v. Wetzel,* 424 U.S. 737 (1976).

3. Enormous amounts of money are involved.

Every step in the site selection process requires great expenditures of time and money. Judicial review at the earliest possible appropriate time is clearly in the best interest of the agency as well as of potentially affected states, local areas and inhabitants. Fiscal importance is a reason for granting writ of certiorari. *Alaska v. American Can Company,* 358 U.S. 224 (1959); *United States v. Zazove,* 334 U.S. 602 (1948).

4. Even an interlocutory order should be reviewed if its effect is immediate.

The parties here represented agree with the position of the State of Texas that the decision in question was reviewable under the specific provisions of the Act, but even if they are mistaken in that regard, the exercise of this Court's jurisdiction is clearly appropriate under the rules set forth in *Federal Power Commission v. Transcontinental Gas Pipe Line Corporation,* 423 U.S. 326 (1976).

CONCLUSION

For all of the reasons set forth above as well as those presented in the petition of the State of Texas, this Court should accept jurisdiction.

Denial of certiorari under the circumstances of this case would create rather than solve problems for the states and for the residents of all areas subject to consideration as nuclear waste repository sites. Even though it apparently seeks to avoid judicial review, even the Department of Energy will be benefited by a specific ruling by this Court. The Solicitor General should be required to respond to the petition unless this Court sees fit to note probable jurisdiction without the filing of any response on behalf of the Department of Energy.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Amici Curiae join the State of Texas in urging that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, Mary Joe Carroll, Attorney for Texas Farm Bureau and American Farm Bureau Federation, Amici Curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of November, 1985, I served copies of the foregoing Amici Curiae Brief in Support of Petition on the parties hereto, said copies being mailed to:

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